Petition

81-496 No.

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In The

Supreme Court of the United States

October Term, 1981

WILLIAM C. FEENEY and HUGO GERMER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Is not a defendant in a federal criminal case denied due process of law where the government refuses to produce specifically requested exculpatory material and the district court refuses both to order the government to produce the material and to examine the material *in camera*?

II. Where the specifically requested material referred to in the preceding question consists of information and documentation contained in an investigative file prepared by the government and relates to an assessment of the credibility of a witness, who is testifying under immunity for prior perjury and whose testimony constitutes the government's entire case, does not this Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976) mandate, at the very least, that a court examine the material in order to determine whether the denial of access by the defendants to the material deprived them of their right to a fair trial?

III. Do not both the Fifth Amendment double jeopardy prohibition and prevailing standards applicable to the construction and interpretation of federal criminal statutes, preclude the imposition of consecutive sentences for violation of 18 U.S.C. §371 (the general conspiracy statute) and 18 U.S.C. §1954 (prohibiting certain agreements to influence union officers) where both the Section 371 violation and the Section 1954 convictions were based on the identical agreement?

PARTIES TO THE PROCEEDING IN THE COURT BELOW

William Feeney and Hugo Germer, petitioners herein and the United States of America, respondent herein were the only parties both to the proceeding in the court below and to the proceeding in the district court.

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I. By upholding the refusal of the district court to make a judicial determination of petitioners' entitlement to the material specifically requested by them pursuant to the rule of *Brady v. Maryland* and *United States v. Agurs*, the court below acted contrary to standards promulgated by this Court. 12

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II. Where a district court permits the government to withhold material specifically requested by a defendant pursuant to the rule of *Brady v. Maryland* and *United States v. Agurs,* the appropriate remedy is to remand the case for a hearing on the issue of whether there existed any reasonable possibility that the undisclosed evidence could have materially affected the jury's verdict. 18

III. Under the circumstances of this case, the imposition of consecutive sentences for the crime of conspiracy and the substantive crime of agreeing to be influenced was violative of the same evidence test promulgated by this Court to resolve claims of impermissible multiple punishment. 20

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINION BELOW

The case below was decided by judgment order, which appears in petitioners' appendix at pages 1a-2a.

JURISDICTION OF THIS COURT

1. Judgment was entered by the United States Court of Appeals for the Third Circuit on May 18, 1981 (2a).

2. A timely petition for rehearing was filed by petitioners in the court below and that petition was denied in an order filed July 8, 1981 (4a).

3. This is not a cross-petition, hence Rule 19.5 is not applicable.

4. Jurisdiction to review the criminal judgment below by writ of certiorari is conferred upon this Court by the provisions of 28 U.S.C. §§1254(1) and 2101(d).

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THIS CASE INVOLVES

Amendments to the Constitution of the United States of America:

> "AMENDMENT 5
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 18, United States Code:

"Section 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

"Section 1954

Whoever being —

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan

services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of his actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined not more than $10,000 or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) 'any employee welfare benefit plan' or 'employee pension benefit plan' means any employee welfare benefit plan or employee pension benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) 'employee organization' and

'administrator' as defined respectively in sections 3(4) and (3)(16) of the Employee Retirement Income Security Act of 1974 [29 USCS §1002(4), (16)]."

STATEMENT OF THE CASE

Petitioners, William Feeney and Hugo Germer, petition this Court to review a decision of the United States Court of Appeals for the Third Circuit affirming their convictions following trial in the United States District Court for the District of New Jersey. Specifically, petitioners seek review of the decision below insofar as it upheld: (a) the district court's refusal to turn over to petitioners or even review, *in camera,* certain specifically requested materials petitioners claimed were exculpatory and (b) the district court's imposition of consecutive sentences for the crimes of conspiracy and unlawful agreements to influence a union official.

Petitioners were each charged with and convicted of three crimes: conspiracy to violate 18 U.S.C. §1954 (prohibiting certain agreements involving union officials) by agreeing to receive kickbacks of $5,000 and $37,500 in connection with the granting by union funds of mortgage loans in the amounts of $50,000 and $37,500 (Count I) and with violations of 18 U.S.C. §1954 by agreeing to receive and receiving those kickbacks (Counts II and III). Consecutive sentences of four years (Count I and three years (Count III) were imposed on petitioner Feeney. Consecutive sentences of three years (Count I) and three years (Count III) were imposed on petitioner Germer.

The Factual Basis for the Claim That Petitioner's Sentences Are Illegal

The basis for petitioners' claim that the district court impermissibly imposed cumulative punishment in derogation of

their rights under the double jeopardy clause of the Fifth Amendment and contrary to accepted standards of statutory construction is that the government charged three agreements to influence a union official and proved one.

According to the government's evidence, petitioner Feeney, a union official, petitioner Germer, a real estate broker and Anthony Battifarano, who owned two apartment buildings, met in November, 1974 at Germer's offices and agreed to the kickback arrangement charged in the indictment. According to that evidence, the meeting was suggested by petitioner Germer who was then engaged in attempting to sell his real estate business to Battifarano. Prior to the meeting, petitioner Germer suggested to Battifarano that a union mortgage in the amount of $375,000 could be obtained on the larger of the two buildings owned by Battifarano if Battifarano would agree to buy Germer's real estate business and pay a kickback of ten percent to Feeney.

At the meeting, Battifarano stated that he did not have the money to pay the kickback. Petitioner Feeney thereupon suggested that a mortgage could be placed on Battifarano's other building in order to provide Battifarano with the needed funds. Battifarano accepted the suggestion and it was agreed that mortgage loans in the amounts of $50,000 and $375,000 would be granted by the union funds in exchange for kickbacks of $5,000 and $37,500 (Tr. 272-273).[1]

Although the government's evidence viewed in its most favorable light further established that the agreement reached in Germer's office was thereafter carried out, the evidence as to the meeting, which came exclusively from Battifarano's testimony, established the guilt of both petitioners as to each of the crimes charged.

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1. References are to the trial transcript.

That view of the effect of Mr. Battifarano's testimony was specifically endorsed by the district court at the Rule 30, F.R.Cr.P., conference during the following colloquy with counsel:

> "THE COURT: The testimony of Mr. Battifarano is that there was a meeting between himself, Mr. Germer and Mr. Feeney and Mr. Germer's office in the back room of Embassy Realty.
>
> * * *
>
> THE COURT: In which an agreement was made, an arrangement to get two loans and to pay Mr. Feeney in advance ten percent of each loan, to make the small loan first in order to generate the cash to pay to make the advanced payment on the second one. That's what that testimony dealt with.
>
> If that testimony is believed, both Count I, Count 2 and Count 3 have been proved." (Tr. 2927).

Moreover, that view of the effect of Battifarano's testimony guided the jury's deliberations because the jury was specifically instructed that petitioner Feeney could be convicted on the substantive Counts II and III, if he agreed to receive or solicited any kickback with intent to be influenced and that petitioner Germer could be convicted if he aided and abetted such agreement or solicitation (Tr. 3183-3184).

Because there was neither a claim by the government or evidence adduced at trial as to any relevant agreement other than the single agreement Battifarano claimed to have reached in petitioner Germer's office in November, 1974, petitioners

contend that it was contrary to law for the district court to have imposed consecutive sentences by treating the single agreement as constituting multiple crimes.

The Factual Basis For The Claims Relating To The Suppression of Exculpatory Material

The evidence upon which the government relied not only as to the agreement in petitioner Feeney's office but, indeed, as to its entire case consisted almost in its entirety of Battifarano's testimony. As was candidly and correctly conceded by the government in its brief in the Third Circuit: "there is no question but that Battifarano's testimony was determinative: without his testimony, corroborated though it was in some particulars, there was no case (Gov't Br., p. 12).

Petitioners Feeney and Germer each testified and denied entering into any kickback arrangement with Battifarano, thus making the credibility determinations crucial. Because there was no question that Battifarano purchased appellant Germer's real estate business and that appellant Feeney was instrumental in obtaining union approval of the mortgage loans to Battifarano, the credibility attack on Battifarano of necessity focussed (apart from his motivations and general reliability as a witness) on his version of the events leading up to and following the mortgage approvals. In particular, Battifarano's financial condition at and prior to the time in question came under close scrutiny because of the competing claims: (a) by him that the two step transaction was arranged because of a lack of funds available to him to pay the $37,500 kickback allegedly required (Tr. 272-273) and (b) by the defense that Battifarano had represented himself throughout the period as a person of substantial financial means and had, in effect, swindled them (*E.g.*, Tr. 2391, 2682-2684).

In support of his claim of impecunity, Battifarano maintained in his testimony that he was engaged in no

occupation and earned no income during the years 1960 to 1975, other than the marginal income he may have derived from owning and operating the two apartment buildings on which he obtained union mortgages as a result of the agreement reached with petitioners (Tr. 352-356). He claimed that one building lost money throughout this period while the other "broke even" (Tr. 239-240).

Inferentially contradicting that testimony were the facts that the Internal Revenue Service conducted a criminal tax investigation of Battifarano in 1976, which he attempted unsuccessfully to abort by paying bribes totalling $12,000 to two I.R.S. Special Agents (Tr. 241-246). As a result, he was arrested in 1977, thereafter charged with three counts of bribery, and, in October, 1978, was sentenced to a term of four years imprisonment (Tr. 246-252).

The apparent inconsistency between Battifarano's claimed impecunity during the years 1960 to 1965 and his felt need to attempt to thwart a criminal tax investigation of his financial affairs during that period was heightened by conflicting claims by him and petitioners as to his motivations for committing perjury at a bankruptcy proceeding and for testifying against them.

It was undisputed at petitioners' trial that, prior to commencing his prison term, Battifarano filed a voluntary petition in bankruptcy listing debts of $777,826 and assets of $1,800. It was further undisputed that Battifarano committed multiple acts of perjury during that proceeding.[2] What was disputed was the extent of and the reasons for his perjury. According to him, the perjury was solely motivated by his desire

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2. Following petitioners' convictions, Battifarano received a discharge in bankruptcy.

to conceal the agreement he had entered into with petitioners and was not motivated, as petitioners contended by a desire to defraud his creditors (Tr. 397, 415-417, 450, 502).

Following his testimony in the bankruptcy proceeding and while in prison on the bribery convictions, Battifarano contacted the United States Attorney and sought to make a deal whereby his sentence would be reduced and he would receive immunity from prosecution for the perjuries committed in the bankruptcy proceeding (Tr. 246-252). A deal was made and, following his testimony before the grand jury which returned the indictment of petitioners, Battifarano's sentence was reduced from four years to six months (Tr. 413-414).

The essential facts as to the government's deal with Battifarano and as to Battifarano's background were known to petitioners prior to trial. Armed with that knowledge, they sought disclosure of the audit and investigative file which had been prepared by the I.R.S. during the tax investigation Battifarano sought to abort by bribery. The file was sought by subpoena and pursuant to the rule of *Brady v. Maryland,* 373 U.S. 83 (1963) requiring the government to disclose on demand exculpatory material in its possession.

Disclosure was initially sought by means of a subpoena seeking "all work papers, compilating and audit prepared. . . regarding the tax situation of. . .Battifarano, including all corporations in which he was involved. . ." (5a-6a) In resisting disclosure, the government did not even contend that the material sought was not *Brady* material. Although characterizing petitioners' *Brady* claim as speculative, the prosecutor stated that he could "foresee the court finding that [the materials sought] are arguable *Brady*." (Tr. 7-9).

Initially, the prosecutor represented to the court that he would attempt to obtain Battifarano's consent in order to avoid

the 26 U.S.C. §6103 issue which he, the prosecutor, had injected into the case (Tr. 9). Subsequently, the prosecutor advised the court that Battifarano, because "his tax situation is still being litigated" would not consent to disclosure (Tr. 27).

The court's response was to state: "I don't care if its *Brady* material" and to state further that *Brady* obligations were the government's concern. (Tr. 61-67) As the court viewed the issue, its concern was confined to whether the subpoena could be enforced consistently with 26 U.S.C. §6103. Any *Brady* questions were to be resolved by the government. *Id.*

During Battifarano's cross-examination, requests for disclosure of the tax file were repeatedly renewed and denied (Tr. 476-478, 481-489, 595, 666, 1162). The district court viewed the tax investigation as having nothing to do with the instant case, notwithstanding Battifarano's frequent assertions of an inability either to remember events or transactions and his inability to produce any records of his own, such records having previously been disposed of by him. In addition, the court further doubted that the audit records would have been helpful in any event because, by reason of Battifarano's lying, it could not be determined whether those records were accurate (Tr. 482).

On appeal from their conviction, petitioners claimed that it constituted reversible error for the district court to have quashed the subpoena and to have repeatedly denied their specific *Brady* requests. Petitioners specifically argued that this Court's decision in *United States v. Agurs,* 427 U.S. 97 (1976) prohibited a district court from refusing to order disclosure of *Brady* material specifically requested without a finding, *based on a review of the material in question,* that the material was not discoverable (Appellants Br., pp. 41-51).

The government countered appellants' argument, not by reliance on the 26 U.S.C. §6103 argument[3] it made in the district court, but rather on the ground that the action of the government in refusing to make disclosure and the action of the district court in refusing to examine the audit and investigative file *in camera* constituted harmless error (Gov't Br., pp. 13-14).

REASONS FOR GRANTING THE WRIT

I.

By upholding the refusal of the district court to make a judicial determination of petitioners' entitlement to the material specifically requested by them pursuant to the rule of *Brady v. Maryland* and *United States v. Agurs*, the court below acted contrary to standards promulgated by this Court.

In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held it to constitute a denial of a defendant's due process right to a fair trial for the prosecutor to withhold exculpatory evidence material either to guilt or punishment. In *Giglio v. United States*, 405 U.S. 150 (1972), this Court held that, when the reliability of a prosecution witness may be determinative of guilt or innocence, the prosecution's non-disclosure of evidence affecting credibility justifies a new trial, under the due process clause, irrespective of the prosecution's good faith or bad faith in withholding such evidence.

As a result of the *Brady* and *Giglio* decisions, it is clear on the facts of the instant case, that the prosecutor was under a

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3. In its brief and in oral argument, no mention was made of 26 U.S.C. §6103. The government was apparently of the view that Section 6103 had no applicability — a view in which petitioners concur. *Cf. Davis v. Alaska*, 415 U.S. 308 (1974) (statutory requirements as to non-disclosure of probation reports must yield to constitutional rights to a fair trial and to confront witnesses).

duty to disclose any evidence in the government's possession which might have affected the jury's assessment of Battifarano's credibility. There can be no question that his reliability was outcome determinative. As the prosecutor conceded in the court below, there was no case against petitioners absent his testimony. Moreover, there can be no question that Battifarano's reliability was open to the most serious question given the facts that: (a) he was a self-proclaimed accomplice,[4] (b) had previously committed perjury in a federal proceeding, (c) had committed other criminal acts and (d) had gained his freedom from prison by implicating petitioners.

This Court had held, even prior to its decision in *Brady v. Maryland, supra,* that the government's obligation of full disclosure is particularly weighty when it seeks a conviction based on the testimony of a witness who has committed prior perjury. *United States v. Mesarosh,* 352 U.S. 1 (1956). Moreover, lower federal courts have repeatedly held that testimony comparable to that relied upon by the government in the instant case must be viewed with the utmost suspicion and, indeed, may in an appropriate case, be deemed insufficient to permit submission of the government's case to a jury. *See, e.g., United States v. Cravero,* 530 F. 2d 666 (5th Cir. 1976); *United States v. Miceli,* 443 F. 2d 256 (1st Cir. 1971); *Tillery v. United States,* 411 F. 2d 644 (5th Cir. 1969).

Against this background of judicial decision and given the prosecutor's concession that the audit and investigative file was arguably the very kind of material a court could well conclude was required to be produced pursuant to this Court's decision in *Brady v. Maryland, supra,* the district court should not have

4. In many jurisdictions, because of the accomplice rule precluding conviction of crime based on the testimony of a self-proclaimed accomplice, the case against petitioners would have been dismissed based on the government's proof. *See* 2 *Criminal Defense Techniques,* Section 39.04[2], p. 39-67.

permitted the government to withhold the material. Indeed, were it required to further reinforce what is to petitioners an obvious conclusion, such reinforcement is provided by the fact that the decision as to non-disclosure was ostensibly being made by the very person, Battifarano, whose credibility was at issue and who arguably had an ulterior motive to suppress the file.

Faced with all of the foregoing, the district court, in permitting the government to withhold the audit and investigative file, abdicated its judicial function. Absent, at the very minimum, an *in camera* review of the file, the district court was simply in no position to conclude with any assurance that the material contained in the file was not the kind of material which the government was required to produce.

Any doubts that the district court might have had as to the appropriate course of action to have been followed should have been resolved by this Court's decision in *United States v. Agurs,* 427 U.S. 07 (1976), which, in petitioners' view, mandated judicial *in camera* review of the file prior to any finding that the government was permitted to withhold it.

The *Agurs* case arose out of a fact pattern which had become increasingly common following the court's decision in *Brady v. Maryland, supra,* to wit: the defense either makes no *Brady* request or requests "all Brady material" or "anything exculpatory"; the government produces nothing; and material discovered during or after trial then becomes the basis for a claim that exculpatory material was improperly withheld.

This Court, in *Agurs,* attempted to deal with this recurrent problem by formulating differing rules to be applied in evaluating *Brady* claims depending on whether or not a specific request for production is made.

In particular, this Court concluded that where, as in the instant case, a specific request is made and:

> "the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge. When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." 427 U.S. at 106.

In the instant case, the prosecutor refused to disclose and the trial judge refused to deal with the problem, being of the philosophical view that it is inappropriate for a trial judge to conduct *in camera* reviews to resolve *Brady* questions notwithstanding this Court's view to the contrary [*See United States v. Five Persons*, 472 F. Supp. 64, 68-69 (D.N.J. 1979) for a full discussion of the trial judge's views in this regard].

Thus, petitioners having made a specific request and being entitled under this Court's holding in *Agurs* to disclosure absent a finding that the material was not exculpatory, were denied disclosure because: (1) the principal witness against them objected to disclosure, (2) the prosecutor deemed himself bound by the witness' wishes and (3) the trial judge was philosophically opposed to conducting *in camera* reviews to resolve *Brady* questions.

On appeal to the Third Circuit, the situation became even more incredible. Notwithstanding that the entirety of its case rested on Battifarano's testimony and that his reliability was open to the most serious question, the government argued not that it was entitled to withhold the material specifically requested but rather that the withholding constituted harmless error.

In essence, the government's position was that, because petitioners had conducted a thorough and searching cross-examination of Battifarano, any impeachment material contained in the audit and investigative file could only have been cumulative or repetitious (Gov't Br., pp. 12-14).[5]

While it is, of course, true that not every non-disclosure by the government results in the denial of a fair trial, the fundamental difficulty with the government's approach (which was apparently endorsed by the court below) is that a reviewing court can not rationally conclude that harmless error has occurred in the context of a *Brady* violation without some judicial analysis of the nature of the material withheld.

In the instant case, the government, in effect, argued to the

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5. The government's argument in this regard is aptly summarized in the following excerpt from its brief:

> "The cross-examination [of Battifarano] delved deeply into such topics as his prior convictions for fraudulent use of credit cards and giving false information to the police (552-52, 906), his plea of guilty and sentence to four years imprisonment and a $10,000 fine on a charge of bribing an IRS agent (370-77), his repeated perjuries in a prior bankruptcy proceeding (391-94, 409-10, 422, 450-58, 491, 508, 510-12, 514-521, 550, 743, 762, 796-801, 1133, 1195), his desire to get out of jail and his deal with the government, including immunity for his prior perjury as well as for his testimony in this trial, and reduction of his sentence (410-18, 491-506, 512-14, 554-59, 577-78, 909-12, 940-41) and inconsistencies in his grand jury testimony (530-32, 633-45, 683-84, 716-17, 876-77, 944). After so extensive and penetrating an assault on Battifarano's credibility, any additional similar impeachment could only be cumulative and/or repetitious and could properly have been excluded by the trial judge. It certainly would not serve to create a reasonable doubt where one did not otherwise exist." *Id.*, pp. 13-14 (footnotes omitted).

Third Circuit that, because petitioners had conducted a searching and thorough cross-examination of Battifarano, it made no difference what the government withheld because anything the government withheld could only have been "cumulative and/or repetitious" (Gov't. Br., p. 14).

By permitting the government to prevail on that type of argument, the court below, we submit, acted contrary to this Court's decision in *Agurs,* which requires district courts to conduct a meaningful review of material specifically requested by a defendant on *Brady* grounds which the government seeks to withhold. *Id.* at 106. Absent such meaningful review, the specific request feature of the *Brady* rule promulgated by this Court in *Agurs* makes no sense.

The approach taken by the court below in upholding the abdication of judicial responsibility by the district court is flatly in conflict with well reasoned precedent in at least one circuit. *United States v. Gaston,* 608 F. 2d 607, 613 (5th Cir. 1979); *United States v. Diaz-Munoz,* 632 F. 2d 1330, 1334 (5th Cir. 1980). That court holds, in reliance on this Court's decision in *United States v. Agurs, supra,* that where a specific and relevant request for disclosure is made, it is reversible error for a district court to rely on the prosecutor's assurances and fail to conduct an *in camera* investigation of the material the government seeks to withhold.

Thus, by sanctioning the district court's refusal to conduct an *in camera* review of the audit and investigative file, the court below has undermined the force of *United States v. Agurs, supra,* as a guiding precedent and has placed itself in conflict with the Fifth Circuit as to the appropriate procedures to be utilized in implementing the *Agurs* rule. Review of the Third Circuit's decision, is, therefore, clearly warranted in order to insure consistency in approach in the lower federal courts as to the application of a rule of fundamental importance to the administration of the criminal justice system.

II.

Where a district court permits the government to withhold material specifically requested by a defendant pursuant to the rule of *Brady v. Maryland* and *United States v. Agurs*, the appropriate remedy is to remand the case for a hearing on the issue of whether there existed any reasonable possibility that the undisclosed evidence could have materially affected the jury's verdict.

Because petitioners have not seen the audit and investigative file, they can only guess as to its contents. To the extent they are required to guess, their argument that they were denied a fair trial under the materiality standards applicable to claims involving the withholding of specifically requested material is somewhat speculative. The fact that their argument is, of necessity, somewhat speculative is not, however, as the government has urged below a reason for denying them relief. It simply raises the question of what relief they are entitled to at the present stage.

Inasmuch as petitioners' convictions rest entirely on the testimony of a self-proclaimed accomplice, who has previously perjured himself and who had a clear motive to perjure himself at petitioners' trial, "this is not the rare kind of case in which the uncontroverted evidence so conclusively establishes the guilt of the accused that it may be said that no matter what was contained in the undisclosed material it could not have affected the outcome of the case." *United States v. Gaston, supra,* at 613.

The contents of the file are clearly relevant to a determination of whether petitioners are entitled to a new trial and, thus, a remand proceeding must be conducted. *United States v. Gaston, supra; United States v. Diaz-Munoz, supra; Chavis v. State of North Carolina,* 637 F. 2d 213, 222-223 (4th Cir. 1980); *see also, United States v. Cole,* 617 F. 2d 151 (5th Cir. 1980).

Because petitioners had specifically requested the file, they are entitled to a new trial unless the government can demonstrate that there existed no reasonable possibility that the material in the file could have materially affected the verdict. *Chavis v. State of North Carolina, supra,* at 223; *United States v. Goldberg,* 582 F. 2d 483, 488 (9th Cir. 1978), *cert. denied,* 439 U.S. 843 (1979); *Jones v. Jago,* 575 F. 2d 1164, 1168-1169 (6th Cir.), *cert. denied,* 439 U.S. 843 (1978). In other words, the government should be required to prove harmless error based on the contents of the file.

Given the fact that the file had been improperly withheld — a fact the government implicitly conceded in the court below — the file should in first instance be made available to petitioners to enable them to demonstrate to the district court, based on the contents of the file, that the withholding of it could have materially affected the verdict. *Cf. Alderman v. United States,* 394 U.S. 165, 182 (1969) (*in camera* review does not suffice to resolve taint claims arising out of illegally seized evidence).

Absent a remand which would permit a meaningful review of the withheld material, the specific request standard of *Agurs* is nothing more than an illusion because the government would be accorded a greater benefit from having withheld the material than it would have received if it had done what the law required it to do.

Such a result should not be countenanced by this Court because a "fastidious regard for the honor of the administration of justice requires the court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be tolerated." *United States v. Mesarosh, supra,* at 14.

III.

Under the circumstances of this case, the imposition of consecutive sentences for the crime of conspiracy and the substantive crime of agreeing to be influenced was violative of the same evidence test promulgated by this Court to resolve claims of impermissible multiple punishment.

Petitioners additionally submit that review of their sentences is required in order to clarify an apparent inconsistency between this Court's holding in *Ianelli v. United States,* 420 U.S. 770 (1974) and its holding in *Whalen v. United States,* 455 U.S. 684 (1980) regarding the imposition of consecutive sentences. *See also, Illinois v. Vitale,* 477 U.S. 410 (1980).

Ianelii v. United States, supra, holds that, in most cases, separate sentences can be imposed for the conspiracy to do an act and for the subsequent commission of that act. *Id.* at 777-778. *Whalen v. United States, supra,* holds that separate sentences may not be imposed for two offenses arising out of the same criminal transaction unless each offense requires proof of a fact which the other does not." *Id.* at 692.

In the instant case, as the trial court recognized at the Rule 30 conference and as it instructed the jury, petitioners committed all three crimes charged in the indictment if the jury accepted Battifarano's testimony as to the agreement reached in petitioner Germer's office.

Under these circumstances, petitioners submit that an exception to rule of *Ianelli v. United States, supra,* existed and that the district court was precluded from imposing consecutive sentences based on the conviction of the conspiracy and substantive counts because such cumulative punishment contravened the "same evidence" test as applied by this Court in *Whalen v. United States, supra.*

In *Whalen*, petitioner was sentenced to consecutive sentences based on his conviction of crimes chargeable under two separate and distinct statutes, one of which prohibited rape and the other of which prohibited murder during the commission of certain specified felonies, including rape. Although the government urged that the two offenses were separate and distinct for sentencing purposes, this Court rejected that argument because on the facts of the case, the government was required to prove the rape in order to convict on the felony murder charge.

What *Whalen* thus stands for, in petitioners' view, is the proposition that the "same evidence" test first promulgated by this Court in *Blockburger v. United States*, 284 U.S. 299, 304 (1937) is not to be applied mechanistically so as to authorize cumulative punishment based on hypothetical applications of two statutes defining different criminal offenses.

Applying this view to the instant case there exists a serious question worthy of this Court's review as to whether cumulative punishment can be imposed for what is essentially a conspiracy to agree and an agreement. Under the *Whalen* rationale, only one crime for punishment purposes was committed because the government, on the facts of this case, was required to prove the Section 1954 charge in order to prove the conspiracy charge.

Circuit courts of appeal have recognized that the *Whalen* holding has modified the *Blockburger* test, but have indicated some confusion as to how that modification is to be applied in the context of convictions of conspiracy and substantive crimes of agreement, such as 18 U.S.C. §1954. Compare *United States v. Previte*, 684 F. 2d 73, 79 and n. 5 (1st Cir. 1981) and *United States v. Wylie*, 625 F. 2d 1371 (5th Cir. 1980); *see also, Pandelli v. United States*, 635 F. 2d 533, 536-538 (6th Cir. 1980); *United States v. Sampol*, 636 F. 2d 621, 651-652 (D.C. Cir. 1980).

In the instant case, moreover, there does not exist a situation comparable to that presented in *Albernaz v. United States*, ____ U.S. ____, 28 Cr. L. Rep. 3099 (March 9, 1981) where consecutive sentences were upheld as to a conspiratorial agreement which violated two separate conspiracy provisions. In the instant case, rather, the agreement violated the general conspiracy provision and a provision aimed at particular agreements, *i.e.*, those involving union officials. In such a circumstance, the general conspiracy provision cannot be used to enhance punishment. *United States v. Corral*, 578 F. 2d 570, 572 (5th Cir. 1978).

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

JOHN J. BARRY
Attorney for Petitioners

APPENDIX

JUDGMENT ORDER DATED MAY 18, 1981

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 80-1794

UNITED STATES OF AMERICA

Appellee

vs.

FEENEY, WILLIAM,

Appellant

Appeal From the United States District Court
For the District of New Jersey
D.C. Criminal No. 79-00380-01

Argued April 20, 1981

Before: HUNTER, SLOVITER, *Circuit Judges,* and STAPLETON,* *District Judge*

After considering the contentions raised by appellant, to-wit, that the court erred:

1) in refusing to examine *in camera* a certain IRS file relating to the government's principal witness;

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* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation.

2) in abusing its discretion by a series of rulings limiting the cross examination of the government's principal witness;

3) in abusing its discretion in admitting certain highly prejudicial evidence concerning other crimes and other acts;

4) in abusing its discretion in refusing to admit certain evidence sought to be offered by the defense;

5) by imposing consecutive sentences on the appellants for having entered into one illegal agreement which constituted either double jeopardy within the meaning of the Fifth Amendment or an illegal sentence by virtue of prevailing canons of statutory construction.

It is ADJUGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ James Hunter
JAMES HUNTER, III, *Circuit Judge*

Attest:

s/ Sally Mrvos
Sally Mrvos, *Clerk*

Dated: May 18, 1981

Judgment Order

Certified as a true copy and issued in lieu of a formal mandate on July 16, 1981

Test: SALLY MRVOS

Clerk, United States Court of Appeals for the Third Circuit

SUR PETITION FOR REHEARING DATED JULY 8, 1981

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 80-1794/95

UNITED STATES OF AMERICA,

Appellee,

vs.

WILLIAM FEENEY and HUGO GERMER,

Appellants

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ James Hunter
James Hunter, III, Judge

Dated: July 8, 1981

SUBPOENA DATED FEBRUARY 13, 1980

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

Crim. No. 79-380

UNITED STATES OF AMERICA

v.

William Feeney and Hugo Germer

To: Regional Director/Custodian of Records
Internal Revenue Service
970 Broad Street
Newark, New Jersey 07102

You are hereby commanded to appear in the United States District Court for the District of New Jersey at Post Office Building in the city of Newark on the 15th day of February 1980 at 10 o'clock A.M. before Judge Biunno to testify in the case of *United States v. Feeney*, and bring with you all work papers, compilation and audit prepared by employee O'Donnell regarding the tax situation of Anthony Battifarano a/k/a Clement Battifarano, a/k/a Anthony Weiss, including all corporations in which he was involved, including the 48th St. Corporation and the Palisades Corporation.

This subpoena is issued upon application of the[1] Defendant, Feeney.

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1. Insert "United States", or "defendant" as the case may be.

Subpoena

February 13, 1980
BROWN & BROWN
Attorney for Defendant, Feeney
26 Journal Square, Jersey City, N.J.

ANGELO W. LOCASCIO
Clerk
By s/ Paul Edinger
Deputy Clerk

Opposition

Office - Supreme Court, U.S.
FILED
NOV 25 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-496

In the Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM C. FEENEY and HUGO GERMER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the district court committed reversible error by declining to require the government to produce an IRS investigative file concerning the chief government trial witness, and by declining to examine the file in camera.

2. Whether the district court erred in imposing consecutive sentences on petitioners with respect to one substantive count and a conspiracy count.

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WILLIAM C. FEENEY and HUGO GERMER, PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1981, and a petition for rehearing was denied on July 8, 1981 (Pet. App. 4a). The petition for a writ of certiorari was filed on September 8, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(d).

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioners

Feeney and Germer were convicted on one count of conspiring to receive kickbacks in connection with the granting of loans by a union (18 U.S.C. 371 and 1954), and on two substantive counts of soliciting and receiving such kickbacks (18 U.S.C. 1954 and 2). Feeney was sentenced to a total of seven years' imprisonment, and Germer was sentenced to a total of six years' imprisonment. The court of appeals affirmed by judgment order (Pet. App. 1a-3a).

The trial evidence showed that Feeney, a trustee of the Pension and Welfare Funds of Laborers Union Local No. 734, and Germer agreed to provide mortgage loans from union funds to co-conspirator Clement Anthony Battifarano in return for kickbacks amounting to some $42,500. When Germer first met Battifarano in 1974, Germer tried to sell him his real estate business (Tr. 264, 266). Failing in that effort, Germer said he could obtain a $375,000 mortgage on one of the two rundown apartment buildings that Battifarano owned, if Battifarano would agree to pay the mortgage installments for one year, pay a 10% kickback to petitioner Feeney, buy Germer's real estate business, and surrender the property to the union at the end of the year (Tr. 236-238, 254-255, 259-260, 266-267, 271).

In September 1974, Battifarano and petitioners met to discuss the deal. When Battifarano said he did not have $37,500 to pay Feeney's kickback, Feeney suggested that they immediately process a mortgage on Battifarano's second rundown apartment building, and that Feeney could take his share from this first loan (Tr. 271-273). Battifarano then insisted on having some proof that the union would indeed grant the mortgage if he paid the kickbacks. Feeney agreed to provide two commitment letters from the union concerning the mort-

gages, which Germer thereafter delivered to Battifarano on November 19, 1974 (Tr. 273-276). In the meantime, at Germer's suggestion, Battifarano and Germer prepared fraudulent appraisals of Battifarano's two properties, falsely inflating their value (Tr. 277-278, 288-292).

The first mortgage loan closed on December 4, 1974. Battifarano provided a $5,000 kickback payment to Germer, who said he would deliver it to Feeney (Tr. 293-297). Battifarano received approximately $20,000 on this loan. A week later, he cashed the loan check. On December 12, 1974, using those and other funds (including some $10,000 that Battifarano had received as a loan from a man to whom he had been introduced by Germer), Battifarano delivered $37,500 to Feeney (Tr. 297-305, 320-324). After Battifarano returned home, he called Germer and informed him that the kickback had been paid. Germer then assured Battifarano that the larger loan would probably close the next day (Tr. 324-325).

The second loan was in fact closed as Germer promised. Germer signed the mortgage as secretary of Battifarano's corporation, a position he did not hold, and Battifarano received approximately $240,000 (Tr. 325-326). Germer insisted after the closing that his part of the agreement be fulfilled, and the sale of Germer's real estate business was therefore completed on the same day, at which time Battifarano gave a post-dated check for $17,000 (Tr. 329-332).

Battifarano made the monthly $522 payments on the smaller loan for a couple of years. On the larger loan, which required monthly payments of $4,000, Battifarano was able to make only about four payments. In compliance with the agreement, the union assumed ownership of each property when Battifarano defaulted (Tr. 339-340).

ARGUMENT

1. There is no merit to petitioners' contention (Pet. 12-19) that they are entitled to a new trial on the ground that the denial of their specific request for an IRS criminal investigation file concerning Battifarano violated their rights under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). It is true that the district court declined to enforce a pretrial subpoena for Battifarano's audit file, and that it subsequently declined to require the production of this file during Battifarano's protracted cross-examination. See page 6, note 3, *infra*. However, the district court was clearly correct in holding that petitioners were not entitled to the file except to the extent that it contained *Brady* material, which the government was already required to and did produce in any event. Moreover, as the trial judge quite properly held, the production of *Brady* material is the responsibility of the prosecutor, and the trial judge therefore properly declined to review the file in camera (Tr. 24-26; C.A. App. 25a),[1] recognizing that "[t]he significance of an item of evidence can seldom be predicted accurately until the entire record is complete." *United States* v. *Agurs*, *supra*, 427 U.S. at 108. Accord, *United States* v. *Five Persons*, 472 F. Supp. 64, 68-69 (D.N.J. 1979).

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[1] The Fifth Circuit decisions upon which petitioners rely (Pet. 17) are clearly inapposite and provide no basis for believing that the Fifth Circuit would have reached a different result on these facts. Indeed, these opinions and the cases upon which they rely clearly suggest the contrary. See *United States* v. *Diaz-Munoz*, 632 F.2d 1330, 1334 (1980); *United States* v. *Gaston*, 608 F.2d 607, 613 (1979).

Although the government originally took the position that the contents of the file could not be disclosed because disclosure was barred by 26 U.S.C. 6103, the prosecutor subsequently reviewed this file and produced for petitioners those portions that were *Brady* material.[2] Petitioners have come forward with no evidence to show that the government has failed to produce material evidence in violation of *Brady*, and their argument is based merely on speculation that the IRS file *might* have contained something that *might* have been helpful. However, it is beyond cavil that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford* v. *Bursey*, 429 U.S. 545, 559 (1977).

Even if petitioners could show that the government had suppressed material that might have been admissible to impeach Battifarano, petitioners would not be entitled to a new trial in any event unless they could also show that the suppressed evidence was "of sufficient significance to result in the denial of the defendant's right to a fair trial." *United States* v. *Agurs*, *supra*, 427 U.S. at 108. In the circumstances of this case, no such showing could possibly be made. As petitioners concede (Pet. 10), Battifarano's checkered history was fully revealed to

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[2] The court of appeals was advised that the prosecutor had reviewed the file and determined that some documents should be disclosed (C.A. Br. 11). We are further advised by the United States Attorney's Office that those materials consisted of a 1973 financial statement by Battifarano, as well as two statements that petitioners had made to IRS agents. The audit file was voluminous, relating to several tax years, and an in camera review would have required herculean efforts by the district court, petitioners having pointed to no specific items of relevant evidence that they thought it likely to contain.

them before trial. Petitioners' counsel was therefore able to cross-examine Battifarano with respect to such matters as his prior convictions for fraudulent use of credit cards and for giving false information to the police (Tr. 552, 906), his guilty plea and sentence of four years' imprisonment for bribing an IRS agent (Tr. 370-377), his perjuries in a prior bankruptcy proceeding (Tr. 391-393, 409-410, 422, 450-458, 491, 508, 510-512, 514-521, 550, 743, 762, 796-801, 1133, 1195), and his general willingness "to lie or deceive when it served [his] interests" (Tr. 352).[3] Moreover, defense counsel knew of Battifarano's arrangements with the government—that he would not be prosecuted on the bankruptcy perjuries in return for his testimony in the instant case, and that his bribery sentence would be reduced to six months' imprisonment—and Battifarano was cross-examined with respect to these arrangements (Tr. 410-418, 491-506, 512-514, 554-559, 577-578, 909-912, 940-941). Finally, defense counsel further attacked Battifarano's credibility by pointing out inconsistencies in his grand jury testimony (Tr. 530-532, 633-645, 683-684, 716-717, 876-877, 944).

Given this wealth of impeachment material, which included documentary evidence (such as Battifarano's

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[3] The transcript of Battifarano's cross-examination, which encompasses some 800 pages, begins as follows (Tr. 352):

Q: Mr. Battifarano, how long have you been in the real estate business or some adjunct, something related to it?

A: I would say since about 1960 or thereabouts.

Q: Would it be fair to say, Mr. Battifarano, that at least since 1960 that you have never hesitated to lie or deceive when it served your interests?

A: I would say you're right.

bad checks, financial statements, and tax returns), it is inconceivable that any additional impeachment material in the IRS file could have affected the outcome of the trial, at which the jury heard not only Battifarano's testimony, but also petitioners'. Because the IRS file was merely of impeachment value, and petitioners already had a plenitude of information to impeach Battifarano's credibility, the outcome of the trial could not have been affected, and any error was therefore harmless. See *United States* v. *Agurs*, *supra*, 427 U.S. at 104, 112-113; *United States* v. *Jones*, 580 F.2d 785, 788-789 (5th Cir. 1978); *United States* v. *McCrane*, 575 F.2d 58, 61 (3d Cir. 1978).

2. Petitioners' contention (Pet. 20-22) that they should not have received consecutive sentences on the conspiracy count and on one substantive count is likewise without merit. Petitioners recognize (Pet. 20) that this Court expressly approved such sentences in *Iannelli* v. *United States*, 420 U.S. 770, 778-779 (1975), but they nonetheless argue (Pet. 20) that consecutive sentences are barred by this Court's decision in *Whalen* v. *United States*, 445 U.S. 684 (1980), because the same evidence was used to prove the conspiracy and both substantive offenses. In *Whalen*, however, the Court specifically reaffirmed (445 U.S. at 691-693) the test articulated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), that is, that consecutive sentences may be imposed where each of the offenses requires proof that the other does not. Because the two statutes here plainly satisfy this requirement, consecutive sentences were properly imposed.[4]

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[4] Contrary to petitioners' assertion (Pet. 21), the courts of appeals have not "indicated some confusion" as to the proper

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

LOUIS M. FISCHER
Attorney

NOVEMBER 1981

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application of the *Blockburger* test after the decision in *Whalen*. Instead, *United States* v. *Wylie*, 625 F.2d 1371, 1380-1381 (9th Cir. 1980), cert. denied, 449 U.S. 1080 (1981), and *Pandelli* v. *United States*, 635 F.2d 533, 538 (6th Cir. 1980), recognized that the *Blockburger* test is based not on the proof adduced at trial, but on the statutory elements of the offenses. In *United States* v. *Previte*, 648 F.2d 73, 79 n.5 (1st Cir. 1981), the court merely suggested in dictum that indictments involving a conspiracy and the substantive offense might be drawn in such a way that the substantive count makes no reference to an agreement. Finally, in *United States* v. *Sampol*, 636 F.2d 621, 653 (D.C. Cir. 1980), a case involving two substantive offenses, the government conceded that the proof required for one offense was sufficient by itself to prove the second.

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